

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1220

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

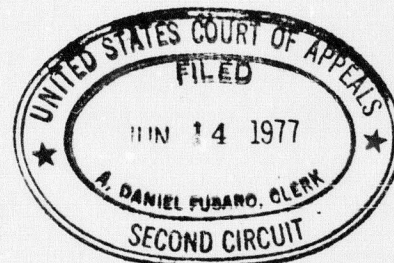
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UNITED STATES OF AMERICA, :
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Plaintiff-Appellee, :
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-against- :
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JACQUES BERENGUER, :
:
Defendant-Appellant. :
:
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P/s
Docket No. 77-1220

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BRIEF FOR APPELLANT

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ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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CONTENTS

	<u>Page</u>
Table of Cases and Other Authorities Cited	ii
Questions Presented	1
Statement Pursuant to Rule 28(a)(3)	
Preliminary Statement	2
Statement of Facts	
A. The Indictment	2
B. The Trial	3
C. The Suppression Hearing	7
D. The Summation and the Court's Charge	10
ARGUMENT	
I THE ADMISSION OF EVIDENCE ABOUT SANSONE'S SALE OF HALF A KILO OF COCAINE TO THE AGENT WAS ERROR REQUIRING REVERSAL	12
II THE MONEY SEIZED IN APPELLANT'S RESIDENCE SHOULD HAVE BEEN SUPPRESSED	16
A. The warrantless entry into appellant's apartment was violative of the Fourth Amendment and requires suppression of the evidence seized as a result of the subsequent arrests and search	16
B. The money seized during appellant's arrest was not in plain view, and the testimony relating to this seizure was erroneously admitted in evidence	23
C. The testimony about the money seized in appellant's apartment was erroneously admitted on the theory that it was a "tool of the trade," and because it was prejudicial, reversal is required	26
Conclusion	28

TABLE OF CASES

<u>Berger v. New York</u> , 388 U.S. 41 (1967)	19, 22
<u>Camara v. Municipal Court</u> , 387 U.S. 523 (1967)	19
<u>Carroll v. United States</u> , 267 U.S. 132 (1925)	17
<u>Coolidge v. New Hampshire</u> , 403 U.S. 443 (1971)	17, 23
<u>Dorman v. United States</u> , 435 F.2d 385 (3d Cir. <u>en banc</u> 1970)	16, 18, 19, 20
<u>Gerstein v. Pugh</u> , 420 U.S. 103 (1975)	17
<u>Johnson v. United States</u> , 333 U.S. 10 (1948)	20, 22
<u>Jones v. United States</u> , 357 U.S. 493 (1958)	17, 19
<u>Katz v. United States</u> , 389 U.S. 347 (1967)	20
<u>United States v. Bradshaw</u> , 490 F.2d 1097 (4th Cir. 1974)	23, 24
<u>United States v. Candella</u> , 469 F.2d 173 (2d Cir. 1972)	24
<u>United States v. Cantone</u> , 426 F.2d 902 (2d Cir.), <u>cert.</u> <u>denied</u> , 400 U.S. 827 (1970)	13
<u>United States v. Cirillo</u> , 499 F.2d 872 (2d Cir. 1974)	13
<u>United States v. Cognato</u> , 408 F.Supp. 1000 (D.Conn. 1976) .	18
<u>United States v. DeCicco</u> , 435 F.2d 478 (2d Cir. 1970) .	12, 13
<u>United States v. DiRe</u> , 332 U.S. 581 (1948)	13
<u>United States v. Falley</u> , 489 F.2d 33 (2d Cir. 1973)	12, 13, 14
<u>United States v. Garguilo</u> , 310 F.2d 249 (2d Cir. 1962)	13
<u>United States v. Gonzalez</u> , 483 F.2d 223 (2d Cir. 1973)	18
<u>United States v. Griffith</u> , 537 F.2d 900 (7th Cir. 1976) .	23, 24

<u>United States v. Johnson</u> , 513 F.2d 819 (2d Cir. 1975)	13
<u>United States v. Keach</u> , 480 F.2d 1274 (10th Cir. 1973)	13
<u>United States v. Lindsay</u> , 506 F.2d 166 (D.C. Cir. 1974) ...	16
<u>United States v. Magnano</u> , 543 F.2d 431 (2d Cir. 1976)	26
<u>United States v. Mapp</u> , 476 F.2d 67 (2d Cir. 1973) .	18, 20, 24
<u>United States v. Phillips</u> , 497 F.2d 1131 (9th Cir. 1974)	
(rehearing denied)	17, 18, 19, 20, 21
<u>United States v. Quintana</u> , 508 F.2d 867 (7th Cir. 1975) ...	13
<u>United States v. Rodriguez</u> , 532 F.2d 834 (2d Cir. 1976).	23, 25
<u>United States v. Rollins</u> , 522 F.2d 160 (2d Cir. 1975)	17
<u>United States v. Santana</u> , 427 U.S. 38 (1976)	22
<u>United States v. Shye</u> , 492 F.2d 886 (6th Cir. 1974)	
.....	17, 18, 19, 20, 23, 24
<u>United States v. Stromberg</u> , 268 F.2d 256 (2d Cir.), <u>cert.</u>	
<u>denied</u> , 361 U.S. 863 (1959)	13
<u>United States v. Tramunti</u> , 513 F.2d 1087 (2d Cir.),	
<u>cert. denied</u> , 423 U.S. 832 (1975)	26
<u>Vance v. State of North Carolina</u> , 432 F.2d 984 (4th Cir.	
1970)	17, 18, 19
<u>Warden v. Hayden</u> , 387 U.S. 294 (1967)	22
<u>Watson v. United States</u> , 423 U.S. 411 (1976)	17
<u>Wolf v. Colorado</u> , 338 U.S. 25 (1949)	20
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963)	22

OTHER AUTHORITIES

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.

L.Rev. 349 (1974) 17

Note, The Neglected Fourth Amendment Problems in Arrest

Entries, 23 Stanford L.Rev. 995 (1971) 17

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
JACQUES BERENGUER,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
JACQUES BERENGUER,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

1. Whether the admission of evidence about Sansone's sale of half a kilo of cocaine to the agent was error requiring reversal.
2. Whether the money seized in appellant's residence should have been suppressed.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles E. Stewart, Jr.) rendered on January 10, 1977, after a jury trial, convicting appellant Berenguer of conspiracy to distribute and possess with the intent to distribute cocaine (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846) (Count One), and aiding and abetting the actual distribution and possession of that drug (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(B)) (Count Two). Appellant was sentenced to two years' imprisonment on each count, the sentences to run concurrently, and to three years' special parole.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. The Indictment

On August 26, 1976, an indictment was filed charging appellant Jacques Berenguer and co-defendant Josalito Garcia with conspiracy to distribute and possess with the intent to distribute cocaine (Count One), and the actual distribution of

23.91 grams of that drug on May 20, 1976 (Count Two).*

B. The Trial

The Government's theory at trial was that during May 1976 appellant Berenguer and co-defendant Garcia conspired to distribute cocaine and that, as part of that conspiracy, appellant aided and abetted the co-defendant's sale of a relatively small amount of cocaine to undercover DEA agent William Schnakenberg.

Agent Schnakenberg testified that on May 14, 1976, at Mama Mia's Restaurant in New York City, he was introduced to appellant by Hugo, a Government informant** who was the chef at the restaurant (35-36, 114***). The agent told appellant that he had learned that appellant had five kilos of cocaine for sale at \$40,000 per kilo; that the price was satisfactory so long as the drug was "uncut" and "pure;" and that for their next meeting the agent would bring a friend who spoke French, the language spoken by appellant (37-38, 114, 115, 119).****

*The indictment is reproduced as B to the separate appendix to appellant's brief. Appellant Berenguer was tried separately from Garcia.

**The Government was unable to produce Hugo for the trial.

***Numerals in parentheses refer to pages of the trial transcript.

****According to the agent, appellant did not speak English. Instead, at the May 14 meeting, the informant acted as their translator.

Later that evening, in Rudi's Bar, DEA agents Schnakenberg and Finnerty, who posed as Schnakenberg's friend and translator, met with the informant and appellant (39-40). There, Schnakenberg stated that he was prepared to purchase five kilos of pure cocaine for \$200,000, but that he wanted a sample of the drug before completing the deal (40-41, 119-120). A meeting was arranged three days later for this purpose. Several meetings occurred between appellant and the agents on May 17 and 18, 1976, as well as one meeting at which appellant, the informant, co-defendant Josalito Garcia, and Agents Schnakenberg and Finnerty were present. No transfer of any cocaine resulted from these meetings (41-43, 47, 49-51, 121-122, 124-126, 129, 131, 209), but the co-defendant told Schnakenberg that the agent would "first have to take an ounce for \$1200" (52).

Schnakenberg testified that in accord with prior arrangements with the co-defendant (55), on May 20, at 7:00 p.m., the agent went to Rudi's Bar, where he met the informant and appellant (56-57). Later that evening, co-defendant Garcia arrived at the bar and, according to the agent, stated that he had the package (58). While appellant remained in the bar (168-169), Agent Schnakenberg and the co-defendant left and went to the agent's automobile (59). Schnakenberg testified that, during the ensuing ride in the car, the agent purchased cocaine from the co-defendant for \$1200 (59, 140, 161-163).

After the sale, Schnakenberg drove to the Holiday Inn on 57th Street where, pursuant to prearrangements, Agent Finnerty

was waiting in a Cadillac, with \$200,000 secreted in the trunk (60-61). Schnakenberg testified that the co-defendant was shown the money, and that he assured the agent that the deal involving this large sum would be consummated (62, 170, 175), but that he would first sell the agent half a kilo for \$20,000 (64, 176-177). Despite these assurances, Schnakenberg never received any more cocaine from the co-defendant, and stated that he never got any cocaine from appellant (187).*

The Assistant United States Attorney then attempted to question Schnakenberg about his unrelated narcotics transaction with one Carmelo Sansone, who was not named in the indictment as a co-conspirator (69-70). As a result of defense counsel's objections, discussion about the propriety of this testimony was held outside the jurors' presence. Defense counsel argued that any evidence involving Sansone's drug transactions was inadmissible, since it related not to the conspiracy charged,

*Five days later, on May 25, 1976, Schnakenberg spoke with co-defendant Garcia. According to Schnakenberg, the co-defendant stated that he was at Rudi's Bar with appellant, and that he had half a kilo of cocaine but that in an hour he would have a kilo of cocaine. Schnakenberg decided to wait, but after the co-defendant failed to contact the agent, Schnakenberg did not pursue the deal (69, 180, 183). Agent Schnakenberg's version of the events was corroborated by the testimony of Agents Finnerty (197-217, 220-223) and Agents Fillmore, Klein, Nargi, Joura, and Moran, who were surveillance agents (250-265, 268-269, 299-300, 300-302, 302-304). In addition, Agent Finnerty testified that on May 19, 1976, he met with appellant and that appellant said there had been some problems but that "something will happen tomorrow" (219).

but to a separate conspiracy in which appellant was not involved (70, 74, 77).^{*} The Assistant United States Attorney contended that, while Sansone's drug dealings did not directly implicate appellant, the jurors could infer that Sansone and appellant were members of the same conspiracy. The Assistant United States Attorney stated:

... [T]he Government feels that because of the association between Mr. Sansone and Mr. Sebbane [appellant Berenguer], as evidenced by their meetings during this period of time that Agent Schnakenberg will testify to, the fact that Mr. Sansone was arrested in Mr. Sebbane's apartment when they were all arrested, and from the fact that the cocaine which Mr. Sansone delivered to the agents and the cocaine that Josalito delivered to the agents, the jury could infer that Mr. Sansone and Mr. Sebbane were indeed part of the same conspiracy.

(71).^{**}

Over defense objections (77), the District Court ruled that the evidence was admissible, holding that "the fact there is a different conspiracy involved in the other case [Sansone's] doesn't make it inadmissible" (77).

^{*}Counsel argued that the only possible connection "is that Hugo, who was working as an informant, introduced Schnakenberg in his undercover capacity to a lot of people, and from some of them they made purchases. But that doesn't make everyone that made purchases co-conspirators with each other" (76).

^{**}Defense counsel pointed out that the jurors could not even infer that the cocaine involved in both transactions was from the same source, since Sansone's cocaine was 80% pure, while the cocaine which was the subject of Count Two was 40% pure (71-74, 141, 388).

Thus, Agent Schnakenberg testified that on June 3, 1976, the informant Hugo introduced the agent to Sansone (80); that Sansone wanted to sell the agents five kilos of pure cocaine; and that he would sell half a kilo first (81). The next day Schnakenberg met with Sansone and the informant at a diner in New York City; the agent gave Hugo \$20,000, and Hugo left with Sansone; one and one-half hours later, Hugo returned with the half kilo of cocaine, which he gave to the agent (82).

Schnakenberg also testified that he saw appellant and Sansone "on different occasions in and around the area," as well as together in a car (81).

DEA agent McMullan corroborated Schnakenberg's testimony about the Sansone narcotics deal by testifying that on June 4, 1976, he saw Sansone, the informant Hugo, and Schnakenberg meet in the Market Diner; that later, the informant and Sansone left; and that he saw the informant return to DEA headquarters with Agent Schnakenberg (282-284).

C. The Suppression Hearing Held During the Trial

By prior arrangement, the trial was interrupted to hold a suppression hearing involving evidence seized and statements made at the time of appellant's arrest. DEA agent Pavlick testified that on August 18, 1976, at approximately 2:15 p.m., he and Agent Levine arrested appellant at appellant's apartment at 330 West 45th Street (308-309). Prior to that time, Pavlick had learned that appellant might be leaving the country

309, 331). In light of these circumstances, on August 17, 1976, Pavlick telephoned an Assistant United States Attorney in the Southern District of New York and discussed whether there was probable cause to arrest appellant and whether an arrest warrant was required (331-332; 336-337). Pavlick stated that after this telephone call he made no effort to obtain an arrest warrant with regard to appellant's alleged violations of the federal narcotics laws or a search warrant for appellant's residence (331-332, 337).*

During the afternoon of the following day, Agents Pavlick and Levine went to arrest appellant in his residence. Arriving in front of the apartment door, Agent Levine drew his weapon,** and Pavlick knocked on the door and said "mailman" or "superintendent." Appellant, in his pajamas, opened the door, whereupon Pavlick announced that he was a federal narcotics agent and that appellant was under arrest (312, 341-343). Pavlick also arrested Carmelo Sansone, who was in the apartment at the time, sitting at a table (314, 343). Appellant and Sansone were then handcuffed "arm in arm," frisked, and "put ... on the bed" (314, 343, 349, 351). Shortly thereafter, Anna Garcia,

*Pavlick testified that he unsuccessfully attempted to obtain an Italian extradition arrest warrant which had been lodged with Interpol (332). He also stated that his purpose for arresting appellant was for the federal narcotics and Interpol offenses (356).

**Pavlick testified that his gun also might have been visible.

the sister of the co-defendant, who had been in the basement doing the laundry, entered the apartment. She, too, was then arrested (315, 344).*

Further, Pavlick testified that he looked into the kitchen, the bathroom, a closet, and under the bed (338). On a bureau he saw a large black leather billfold (316, 339-340). Pavlick stated that he could not see inside the billfold; that its contents were not exposed; and that he was unable to determine what it contained without further opening or unzipping the various compartments. Nevertheless, he opened the billfold and searched its compartments (338-340). Inside the billfold, Pavlick discovered appellant's passport, a driver's license bearing the name Jack Brand, and \$3,200 in \$100 bills (316, 318). Pavlick also seized appellant's wallet and "6 or 7 dollars" which were lying on a table (315-319, 340).** The total amount of money seized in the apartment was \$3,453 (320).

Defense counsel argued that the items seized at the time of appellant's arrest were inadmissible, since the search was not incident to appellant's arrest and the officers had not obtained a warrant (357-358).*** The Assistant United States

*Pavlick stated that the charges against Anna Garcia were dropped (380).

**Pavlick stated that apparently appellant and Sansone had been playing cards (319) and that the billfold on the bureau and the wallet on the table did not appear to be weapons (348).

***Trial counsel conceded that there was probable cause to arrest appellant (357).

Attorney contended that the agents were properly in appellant's apartment to arrest appellant, and that the evidence seized was in plain view (360). The District Court, ruling that Chimel v. California, 395 U.S. 752 (1969), was inapposite, agreed with the Government's contentions, holding that the items seized by Pavlick were admissible under the plain view doctrine (364). However, the District Court suppressed appellant's passport and the driver's license, ruling that these items lacked probative value (365-366).

The Assistant United States Attorney, relying on this Court's decision in United States v. Tramunti, 513 F.2d 1087, 1105 (2d Cir.), cert. denied, 423 U.S. 832 (1975), argued that the cash seized was admissible. Over defense counsel's objections (367), and despite the fact that the District Court found the money only marginally relevant, Judge Stewart permitted testimony about its seizure (367, 377-378).*

D. The Summation and Charge

On summation, the Assistant United States Attorney reviewed the proof relating to Sansone's sale of half a kilo of cocaine to Agent Schnakenberg. Thus, the jurors were told that they had heard testimony that the agents "purchase[d] from Mr. Sansone approximately a half kilogram of cocaine for \$20,000, and

*Pavlick testified that this money was not part of the funds given to the Government informant with which to purchase cocaine (382).

... that Mr. Sansone was arrested in [appellant's] apartment and [appellant] was also seen with Mr. Sansone" (430). The Assistant United States Attorney then referred to the photograph of Sansone which had been admitted into evidence (430), and stated, "These dealings with Mr. Sansone go on" (430). Further, he described appellant's arrest and the seizure of money at that time, as well as the money appellant spent on rented cars during the summer of 1976 (430-431).*

The District Court gave no instruction on whether and how the jurors were to consider the testimony relating to Sansone's sale of cocaine.**

After deliberations on two different days, the jurors found appellant guilty as charged.

*Ar employee of Avis Rent-a-Car had previously testified that appellant had spent approximately \$1,500 to rent cars during the spring and summer of 1976 (372-373).

**The complete text of the Court's charge to the jury is reproduced as C to the separate appendix to appellant's brief.

ARGUMENT

Point I

THE ADMISSION OF EVIDENCE ABOUT SANSONE'S
SALE OF HALF A KILO OF COCAINE TO THE AGENT
WAS ERROR REQUIRING REVERSAL.

The evidence relevant to this case involved discussions about large amounts of cocaine, but the actual transfer of less than an ounce by the co-defendant, Josalito Garcia. Despite this, the Government was permitted to show that on June 4, 1976, Carmello Sansone, who was not named in the indictment, sold a much larger amount -- one-half kilo -- to Agent Schnakenberg. Over defense objections that this was proof of a separate conspiracy in which appellant was not involved, the District Court allowed the evidence, stating that "the fact there is a different conspiracy involved in the other case [Sansone's] doesn't make it inadmissible" (77). This determination was error and, because the proof was extremely prejudicial, reversal is required. United States v. Falley, 489 F.2d 33, 37-38 (2d Cir. 1973); United States v. DeCicco, 435 F.2d 478, 483 (2d Cir. 1970).

At trial, the Government failed to show any connection between appellant and the Sansone sale. While the Government argued that proof of appellant's participation with Sansone in one conspiracy was shown by the fact that appellant had been seen in Sansone's company and that they were arrested together, this contention is clearly incorrect:

Guilt may not be inferred from mere association with a guilty party.

United States v. Johnson,
513 F.2d 819, 824 (2d Cir.
1975).

See also United States v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962); United States v. Cirillo, 499 F.2d 872, 883 (2d Cir. 1974); United States v. Cantone, 426 F.2d 902, 904 (2d Cir.), cert. denied, 400 U.S. 827 (1970); United States v. Stromberg, 268 F.2d 256, 267 (2d Cir.), cert. denied, 361 U.S. 863 (1959); United States v. Quintana, 508 F.2d 867, 880 (7th Cir. 1975); United States v. Keach, 480 F.2d 1274, 1287-1288 (10th Cir. 1973); United States v. DiRe, 332 U.S. 581, 593 (1948).

The danger that the jurors would apply this "'birds of a feather' theory of justice," see United States v. DeCicco, supra, 435 F.2d at 483, was particularly great here, since they were not instructed to disregard the evidence relating to Sansone or given limiting instructions, and were therefore left free to consider Sansone's narcotics sale and association with appellant as proof of appellant's guilt of the charges in the indictment.*

United States v. Falley, supra, involved a similar situation. There, the indictment charged Michael and Janet Falley and co-defendant David Stolzenberg with conspiring to import

*However, even a limiting instruction would have been ineffective in curing the error involved. See United States v. Falley, supra, 489 F.2d at 38.

2,000 pounds of hashish. Although none of the narcotics involved in that conspiracy was ever produced at trial, a suitcase containing five kilograms of hashish, which an accomplice had attempted to import, was admitted in evidence. However, the proof showed that those drugs were to be delivered not to the Falleys, but to their co-defendant. This Court, finding that the evidence of the five kilogram importation was therefore unrelated to the conspiracy charged, held that these circumstances required reversal because of their obviously improper effect on the jurors' determination. The same result is required here.*

The testimony relating to the Sansone sale of more than one pound of cocaine was erroneously admitted in evidence. During the trial, which involved the actual transfer of less than one ounce of cocaine by a co-defendant, evidence of the Sansone sale was impermissibly used in an attempt to show appellant's guilt merely by his association with Sansone. Indeed, by reviewing the evidence of the unrelated June 4 deal and by arguing that appellant was involved in illegal drug transactions with Sansone -- "These dealings with Mr. Sansone go on" (430) -- an assertion unsupported by the record -- the Assistant United States Attorney employed the proof for

*This case presents an even more egregious situation than that in Falley, since the District Court in that case attempted to ameliorate the prejudice suffered by giving cautionary instructions during the course of the trial and in the charge. United States v. Falley, supra, 489 F.2d at 36, 42.

precisely this improper purpose. Thus, because the proof was highly prejudicial, reversal of the judgment is required.

Point II

THE MONEY SEIZED IN APPELLANT'S RESIDENCE
SHOULD HAVE BEEN SUPPRESSED.

- A. The warrantless entry into appellant's apartment was violative of the Fourth Amendment and requires suppression of the evidence seized as a result of the subsequent arrests and search.

As a result of the May 20 sale of cocaine by co-defendant Josalito Garcia to Agent Schnakenberg, Agent Pavlick believed that there was probable cause to arrest appellant for violation of the drug laws.* Despite the fact that the May 20 transaction had occurred approximately three months previously, Pavlick did not seek judicial authorization for the arrest based on the information that led to his belief, but rather, after consultation with the United States Attorney's office, decided to effect appellant's arrest without a warrant in appellant's apartment.

This entry into appellant's residence, not validated by a warrant nor justified by exigent circumstances, violated the requirements of the Fourth Amendment and mandates reversal. Dorman v. United States, 435 F.2d 385, 390-391 (D.C. Cir. en banc 1970); United States v. Lindsay, 506 F.2d 166, 171 (D.C.

*Defense counsel conceded that the agent had probable cause to arrest, but argued that the search was not valid since it was not justified by a warrant.

Cir. 1974); United States v. Phillips, 497 F.2d 1131, 1135 (9th Cir. 1974) (rehearing denied); United States v. Shye, 492 F.2d 886, 893 (6th Cir. 1974); Vance v. State of North Carolina, 432 F.2d 984, 990-991 (4th Cir. 1970); cf. Coolidge v. New Hampshire, 403 U.S. 443, 480-481 (1971); see Note, The Neglected Fourth Amendment Problem in Arrest Entries, 23 Stanford L.Rev. 995 (1971); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L.Rev. 349, 360 (1974).

The facts of this case squarely present the question of "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975). While it is settled that a felony arrest in a public place based solely on probable cause, is generally valid, Watson v. United States, 423 U.S. 411, 417 (1976); Carroll v. United States, 267 U.S. 132, 156 (1925); United States v. Rollins, 522 F.2d 160, 167 (2d Cir. 1975), the question of whether a warrant is necessary to make an arrest in a home explicitly remains unresolved, in both this and the Supreme Court. Watson v. United States, supra, 423 U.S. at 418, n.6; Gerstein v. Pugh, supra, 420 U.S. at 113, n.13; Coolidge v. New Hampshire, supra, 403 U.S. at 480; Jones v. United States, 357 U.S. 493, 499-500 (1958);

United States v. Mapp, 476 F.2d 67, 74 (2d Cir. 1973);* see also United States v. Cognato, 408 F.Supp. 1000, 1003 (D.Conn. 1976).

The four Circuit Courts of Appeal which have considered the question -- the Fourth, Sixth, Ninth, and District of Columbia Circuits -- have all held that, absent exigent circumstances, a warrant is required for the purpose of entering a dwelling to arrest a suspect. Dorman v. United States, supra, 435 F.2d 385; United States v. Phillips, supra, 497 F.2d 1131; United States v. Shye, supra, 492 F.2d 886; Vance v. State of North Carolina, supra, 432 F.2d 984.

Dorman is characteristic. There, the court held that

the constitutional safeguard that, with room for exceptions ["exigent circumstances" or "urgent need"] assures citizens the privacy and security of their homes unless a judicial official determines that it must be overridden, is applicable not only in case of entry to search for property, but also in case of entry in order to arrest a suspect.

Id., 435 F.2d at 390.

*This Court's decision in United States v. Gonzalez, 483 F.2d 223, 224-225 (2d Cir. 1973), did not resolve the question, and that case is distinguishable. There, Customs agents entered a transient hotel room into which the defendant had just gone. Moreover, in Gonzalez, the record shows that exigent circumstances existed to justify the entry, since it was clear that the agents knew that any delay would have resulted in the destruction of incriminating evidence known to be in the defendant's possession at the time. Here, exigent circumstances for the entry did not exist.

See also United States v. Shye, supra, 492 F.2d at 893 ("warrantless entry of a dwelling for the purpose of arrest is per se unreasonable absent 'exigent circumstances'"); United States v. Phillips, supra, 497 F.2d at 1135 (accord); Vance v. State of North Carolina, supra, 432 F.2d at 990 ("an arrest inside a dwelling without a warrant, or pursuant to an invalid warrant, is per se unreasonable under the Fourth Amendment unless there are 'exigent circumstances' justifying the police in bypassing a magistrate").

Reference to the Fourth Amendment and the judicial authorities which apply it establish that these decisions are correct. The Amendment provides that:

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Its basic purpose is to safeguard the privacy of an individual's home from arbitrary governmental invasion.* Berger v. New York, 388 U.S. 41, 53 (1967); Camara v. Municipal Court, 387 U.S. 523, 529 (1967); Jones v. United States, 357 U.S. 493, 498 (1958). Indeed, the Supreme Court has termed this

*"Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." Dornan v. United States, supra, 435 F.2d at 389.

right "basic to a free society":

The knock at the door, whether by day or by night ... without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

Wolf v. Colorado, 338 U.S.
25, 27-28 (1949).

As the Court has made clear:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.... When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

Johnson v. United States,
333 U.S. 10, 13-14 (1948).

Thus, except for a few, well-delineated exceptions, searches conducted without prior approval of a judge or magistrate are, per se, violative of the Fourth Amendment. Katz v. United States, 389 U.S. 347, 357 (1967); see United States v. Mapp, supra, 476 F.2d at 76. This same rule also applies to an entry in a home to effect an arrest. Dorman v. United States, supra, 433 F.2d at 390-391; United States v. Phillips, supra, 497 F.2d at 1135; United States v. Shye, supra, 492

F.2d at 891. Since an arrest -- a seizure of the person -- in a home is the most extreme intrusion, it follows a fortiori that such a seizure must be made with a warrant.

Moreover, the terms of the Fourth Amendment themselves do not differentiate between searches and arrests. Thus, whether persons or things are to be seized, a valid warrant requires a description of the place to be searched and the persons or things to be seized.

Not only is it undisputed that no warrant was obtained here, but it is clear that exigent circumstances did not exist. The narcotics transaction which was the subject of the indictment occurred almost three months before the arrest. While Agent Pavlick stated that he had learned that appellant was going to leave the country, the agent waited at least one or two full days before effecting the arrest.* Thus, there was no indication of imminent flight, and the crime charged was not one involving violence. United States v. Phillips, supra, 497 F.2d at 1135 n.2.

The warrantless entry into appellant's apartment to arrest him was violative of the Fourth Amendment. The evidence seized

*The agent's testimony was somewhat unclear on this point. He testified that he first learned that appellant might be leaving the country on either August 16 or 17, 1976 (331). The arrest occurred during the afternoon of August 18, 1976.

as a result of that entry must be suppressed. Wong Sun v. United States, 371 U.S. 471, 488 (1963).*

*United States v. Santana, 427 U.S. 38 (1976), is distinguishable. There, the defendant was in a "public" place, where she was to be arrested. To avoid arrest, she retreated into her home. In upholding the validity of the subsequent arrest without a warrant in Santana's house, the Court found that the ensuing police entry was justified by the theory of "hot pursuit." See Warden v. Hayden, 387 U.S. 294 (1967); Johnson v. United States, 333 U.S. 10, 16 n.7 (1948). Such facts are not present in this case, and appellant was inside his apartment prior to the police intrusion -- a crucial circumstance entitling him to the greatest expectation of privacy. See, e.g., Berger v. New York, supra, 388 U.S. at 53.

B. The money seized during appellant's arrest was not in plain view and the testimony relating to this seizure was erroneously admitted in evidence.

On a bureau in appellant's apartment, the agents saw a large black billfold and, on a table, a smaller wallet. However, the agents could not see what was inside those objects or determine their contents without further opening or unzipping their hidden compartments. Despite this, the District Court held that testimony about the moneys that were found inside the billfold and wallet were admissible on the ground that they were in plain view. This finding was erroneous and requires reversal. United States v. Griffith, 537 F.2d 900, 903-904 (7th Cir. 1976); United States v. Shye, 473 F.2d 1061, 1066 (6th Cir. 1973) (McCree, J.); see also United States v. Rodriguez, 532 F.2d 834, 839 (2d Cir. 1976); United States v. Bradshaw, 490 F.2d 1097, 1101 (4th Cir. 1974).

In Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971), the Supreme Court explained:

It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind that, in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the 'plain-view' doctrine has been to identify the circumstance, in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.

Id.; emphasis in the original.

See also United States v. Mapp, supra, 476 F.2d at 81 n.15.

Courts which have dealt with similar situations to that involved in this case have held that where "an officer discovers facts which give him reason to believe that evidence of crime will be found by a further intrusion beyond the scope of the original intrusion, the 'plain view' doctrine is inapplicable..."

United States v. Bradshaw, supra, 490 F.2d at 1101.

Thus, the contents of a container which has been seen by police officers in effecting a lawful arrest is not admissible.

All that was in plain view was a plain brown bag, which did not itself constitute evidence, a fruit, or an instrumentality of the crime.

United States v. Shye, supra,
473 F.2d at 1066 (money suppressed).

Accord, United States v. Griffith, supra, 537 F.2d at 903 ("The contents [of a brown paper sack] were not subject to seizure under the plain view doctrine even though the sack was 'open,' since Officer Bolin's inspection was not inadvertent").

United States v. Candella, 468 F.2d 173 (2d Cir. 1972), is instructive by comparison. There, in the course of arresting the defendant Candella, the agents asked the defendant whether he had any of the guns he was charged with purchasing. Pointing to a closed carton, the defendant told the agents that some of the guns were in that container. In validating this seizure, this Court found that the guns were in "plain view" only because Candella's statement "was the equivalent of his opening the containers for the agents' inspection." Id., 469 F.2d at 175.

Here, the money inside the wallet and billfold was not seen by the agents or revealed by any other equivalent means. It was therefore not in plain view and should have been suppressed. See also United States v. Rodriguez, supra, 532 F.2d at 839.

Moreover, the testimony relating to the money seized was important to the Government's case. Thus, on summation, the Assistant United States Attorney argued that the money found at the time of appellant's arrest, along with the cash used to rent cars in the spring and summer of 1976, was corroborative of the Government's claim that appellant was dealing in cocaine. Because the testimony relating to the money seized during appellant's arrest was erroneously admitted, reversal is required.

C. The testimony about the money seized in appellant's apartment was erroneously admitted on the theory that it was a "tool of the trade," and because it was prejudicial, reversal is required.

Citing this Court's decision in United States v. Tramunti, supra, 513 F.2d at 1105, the Assistant United States Attorney argued that testimony about the cash found in appellant's apartment three months after the date of the sale charged in the indictment was relevant and admissible, on the theory that the money was a tool of the narcotics trade and proof of the purpose of dealing in narcotics (367). The Government's reliance on Tramunti was misplaced, and the testimony cannot be justified on this theory.

In upholding the admission of \$967,450 in evidence in Tramunti, this Court set forth the prerequisites for allowing proof of possession of money in narcotics cases. Thus, in order to show that the money involved was relevant, the Government must first prove (1) the possession of large amounts of unexplained cash (2) in connection with large-scale narcotics trafficking. United States v. Tramunti, supra, 513 F.2d at 1105;* see also United States v. Magnano, 543 F.2d 431, 437 (2d Cir. 1976).

*"The possession of large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools or apparatus, which is admissible to show the doing of an act requiring those means." United States v. Tramunti, supra, 513 F.2d at 1105.

Here, none of these requirements was met. While there were discussions about the sale of large amounts of cocaine, there was only one actual transfer -- of less than one ounce. Moreover, the amount of cash seized (\$3,453) was nowhere near the amount allowed in Tramunti (\$967,450) or Magnano (\$500,000), and could not properly serve as the basis of an inference by the jurors that the money involved was the means for the continued operation of a narcotics conspiracy.

The testimony about the money found in appellant's apartment was erroneously admitted in evidence. Because it was prejudicial (see, Point II-B, supra), reversal of the judgment is required.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

June 14 , 1977

corrected

I certify that a *corrected* copy of this brief [REDACTED] has been mailed to the United States Attorney for the Southern District of New York.

Jonathan Hilberman

